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Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
APRIL TERM, 1985

REINHOLD V. SOMMERSTEDT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Can the Prosecution fail to prove all four elements (intimidating, impeding, interfering, and assaulting, under Title 18 U.S.C. Section 111) charged under the Indictment? [Due Process].

QUESTION 2: Can the Trial Court refuse to define "Offensive Touching" in its instructions to the jury under Title 18 U.S.C. Section 111? [Due Process].

QUESTION 3: Did the Trial Court err in refusing Petitioner's request for a "De Minimus" instruction as to the Level of Force Constituting the Alleged Battery? [Due Process].

QUESTION 4: Can the Trial Court refuse to instruct the jury on a lesser-included offense? [Due Process].

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Petitioner, Reinhold V. Sommerstedt files this Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the Trial Court's Judgment and denied a Request for Rehearing En Banc.

In support of the Petition, it is respectfully shown to the Court as follows:

OPINIONS BELOW

The opinion of the Court of Appeals was officially reported. A copy of the full original text of that opinion is attached as Appendix A. A copy of the Order of the Court of Appeals denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc is attached as Appendix B. A copy of the Opinion and Judgment is attached as Appendix C. A copy of the Order of the Court of Appeals granting Stay of Mandate is attached as Appendix D. A copy of the Order of the Court of Appeals extending stay of Mandate is attached as Appendix E.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 7, 1984. A Petition for Rehearing, With Suggestion for Rehearing En Banc, was denied on June 13, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involved 18 U.S.C. Section 111. Petitioner was convicted of intimidating, impeding, interfering, and assaulting United States Attorney Christine Byrd.

SUMMARY OF THE CASE

On December 5, 1983, Sommerstedt, a resident of Inglewood, California, drove to the Pasadena City Hall with a companion, Wesley Stepp to attend oral arguments in *Armen Condo v. United States.* When they arrived, the courtroom was already packed with spectators.

At the same time Richard Malone and Allen Lipkin, Special Agents of the Internal Revenue Service, took their seats on the opposite side of the aisles. Having successfully assisted in the prosecution of Condo, Lipkin and Malone came determined to preside over the final appellate demise of their ideological nemesis. Present also, though acting undercover, were United States Marshals Thomas Crotty and Timothy Miller, assigned by the General Services Administration to provide courtroom security for the Panel of the Ninth Circuit conducting the oral arguments. At some point during Condo's oral presentation, Sommerstedt stood mute in a silent show of support for the professed ideals of the pro se Appellant, the attempted implementation of which were characterized, by the comment of at least one of the Justices of the Panel, as a ". . . lonely battle. . . ." (R.T. Page 255) (R.T. Pages 296-297).

At the conclusion of the Appellate argument Sommerstedt, Lipkin and Malone briefly discussed return of Sommerstedt's records and personal effects which were seized by these Agents as the result of a prior search at Sommerstedt's place of business. (R.T. Pages 339 and 341) (R.T. Page 478).

Thereafter, Sommerstedt exited the courtroom. He had committed no crime at this point but, apparently, had aroused the ire of Lipkin and Malone who proceeded to take up a position in the breezeway (R.T. Page 355) with Marshals Crotty, Miller and the alleged victim, Byrd, who had just previously argued the government's case. (R.T. Pages 489 and 493).

The exact position of the "Government group" in the twelve-foot corridor was hotly contested. However, even

the Government conceded that two Special Agents, two Marshals, and a U.S. Attorney, five people in all, were standing in a semi-circle when Sommerstedt approached them at a "brisk pace." At some point, according to the Government, Somerstedt collided with or "bumped" U.S. Attorney Byrd and the crime was consummated.

According to Byrd, she was not physically hurt but, after thinking about the incident, and her prior conversations with the agents, became "very, very frightened." (R.T. Page 162). Malone, Crotty, Lipkin, Miller, and even Byrd herself, conceded that no effort was made to arrest Sommerstedt while the latter was leaving the scene of the alleged felony.

After a period of "cool reflection" in the offices of the United States Attorney for the Southern District of California, Mr. Richard Drooyan, the pater familias of the Federal Prosecutors of that District, decided to seek an indictment under the assault statute. (Title 18 U.S.C. Section 111).

Shortly after return of the indictment from an initially reluctant Grand Jury, Malone arrested Sommerstedt just outside of his place of business. The extensive proceedings which resulted thereafter aptly support the public criticism that in our overly complex and legalistic society inventive and ingenious government prosecutors may spawn fiscally ruinous felony prosecutions from even the slightest minutia of indignity visited upon its majesty by the private citizen.

STATEMENT OF THE CASE

QUESTION 1.: Can the Prosecution fail to prove all four elements (intimidating, impeding, interfering, and assaulting, under Title 18 U.S.C. Section 111) charged under the Indictment? [Due process].

The Government in this case charged the Petitioner with forcibly "assaulting, and impeding, and intimidating, and interfering" [with] the Assistant U.S. Attorney Byrd. Having charged all four of the actionable elements under Section 111, the Government was obliged to prove each element. The failure to prove each of the four elements, beyond a reasonable doubt, vitiates the conviction.

In *U.S. v. Goodwin,* 440 F.2d 1152 (C.A. 3, 1971), the Government's burden of proof in an assault case was described as follows:

> "We note initially that Defendant was charged in one count with all six acts proscribed by 18 U.S.C. Section 111, and the Government tacitly concedes that the word 'forcibly' modifies each of them. Citing *Long v. U.S.A.*, 199 F.2d 717, 719 (C.A. 4, 1952).
>
> Since we do not know which act or acts the jury found Defendant to have committed, the conviction may be sustained only if we find sufficient evidence of all of the acts charged. We are satisfied that, when Defendant pushed and struggled with the Agents and attempted to break away from their grasp, he was guilty of forcible assault and resistance, even though those words require more than mere passive resistance. We also think that, under the circumstances, Defendant's attempts to incite an already menacing crowd placed the agents in fear of danger and would justify a finding of forcible intimidation. While the remaining words in the Statute —'opposes, impedes, and interferes'—appeared to

> have been intended primarily to acts by third persons who are not involved in resisting their own arrest, we believe that there was sufficient evidence to justify the jury in finding that Defendant forcibly committed each of those three acts against the agents making the arrest.". See *Goodwin* at Page 1154.

Under the above rationale, a reviewing Court on appeal must find sufficient evidence to support Sommerstedt's conviction on all four of the acts and elements with which he was charged in the Indictment. Thus, unless the Prosecution is able to prove that Sommerstedt committed all of the acts in question, "impeding, interfering, intimidating, and assaulting", this Court must reverse the conviction for insufficiency of evidence.

An examination of the evidence indicates, at best, a battery. The Government even announced, at the start of its case, that Christine Byrd was not placed in immediate fear by the "collision". (R.T. Page 62). Although the Prosecution later retreated from this position, the retreat merely highlights the weakness of the evidence in this case.

Certainly the evidence of any crime was, in the classic sense, "underwhelming". Although the trial lasted a mere two days, the jury deliberated almost as long.

While the battery itself might be consistent with, and sufficient for, a finding of assault, the other necessary elements of the indictment are not present in the evidence of this case. While Byrd may argue, with slight support, that she was "intimidated" by the contact which Special Agent Malone described as a "bump", the evidence is woefully insufficient to support a finding that she was "impeded" or "interfered with" in the performance of her duties.

The Prosecution's strained efforts to stretch Section 111 to cover the factual events and occurrences surrounding the Indictment is not only far fetched, but an effort to impermissibly expand the reach of the statute itself. The Government could cite no case at trial, and cannot provide this Court with authority which supports, the proposition that the terms "impeded" or "interfere" are linked with the wording "on account of her official duties". All cases previously cited by the Government at trial, and those which will be cited here, involved assaulting or intimidating a Government official in the process of performing his or her duties, or as a result of the official duties. The cases concerning impeding and interfering, on the other hand, involved actual frustration of performance of on-going official acts or tasks on the part of the victim.

As stated in *Goodwin,* in this regard:

> "While the remaining words in the statute—'opposes, impedes, and interferes'—appear to have been intended primarily to apply to acts of third persons who are not involved in resisting their own arrest, we believe that there was sufficient evidence to justify the jury in finding that the Defendant forcibly committed each of those three acts against the agents making the arrest.". See *Goodwin* at Page 1154.

The wording in *Goodwin* is clear. The Third Circuit Panel would have reversed the convictions if the evidence had been insufficient as to *any* of the elements or acts charged in the Indictment. When the Prosecution sees fit to charge four elements under the statute, it must be prepared to prove them, beyond a reasonable doubt, or face entry of acquittal.

There is no evidence whatsoever that Assistant U.S. Attorney Byrd was impeded by Sommerstedt. Furthermore, there is no evidence that any act of Sommerstedt "interfered" with the performance of her official duties. The only evidence offered in this regard, by the Government, is so slight as to barely warrant mention. According to Byrd, she was initially "shocked" by the incident. It took her almost ten minutes to become "very frightened". (R.T. Page 162). After realizing that she had been "attacked" she missed a turn on the freeway, enroute to her office (R.T. Page 162).

The Prosecution's proof is insufficient, as a matter of law, to establish that Byrd was impeded or interfered with, in any measure, in the performance of her official duties, either before, or after, the incident. The effort by the Prosecution to inflate a "simple assault and battery" case into a Section 111 felony dooms the entire verdict. The District Court erred in denying Sommerstedt's Motion for Judgment of Acquittal, made both after the Prosecution had rested, and at the close of all of the evidence. This Court should adopt the Rule of the Third Circuit in *Goodwin* as it pertains to Section 111 of Title 18 for this and all future cases. The Prosecution should not be allowed the benefit of charging all elements or acts of this particular statute if it is not prepared to prove them beyond a reasonable doubt. A less restrictive rule results in "Indictment prejudice" to the Defendant, arising from the charging of all of the acts or elements of the statute where the Prosecution knows it can prove but one or two.

QUESTION TWO

QUESTION 2: Can the Trial Court refuse to define "Offensive Touching" in its instructions to the jury under Title 18 U.S.C. Section 111? [Due process].

The District Court allowed the jury to speculate as to the meaning of the term "offensive" and, therefore, did not properly instruct the jury.

Under the state of the instructions given by the District Court the jury could convict if it determined that Ms. Byrd found that the touching was "offensive" regardless of its underlying circumstances. Such was error and the Prosecution misrepresents the state of the record when it claims that the Defense "failed to request an instruction defining 'offensive touching' ". (R.T. Page 560).

Even in the absence of a specifically worded request for an instruction, a Federal Court must nevertheless charge the jury on the broad fundamental rules of law applicable to the principal issues of fact in the case. See Vol. 35, B.C.J.S. Section 991, Note 6. This principle of law imposing the duty to charge the jury is restated in *Turner Construction Co. v. Houlihan,* 240 F.2d 435 (C.A. 1, 1957) and other decisions of the Federal Circuits.

As the case was ultimately presented to the jury the issue of whether an "offensive touching" had occurred became the key to the case. Since Assistant United States Attorney Byrd did not receive a tangible injury, it was necessary to rely on the type of battery which would constitute an "offensive touching" to sustain a conviction for assault.

Under the state of the District Court's instructions the convicting jury assumed that any touching at all was offensive and that, therefore, Petitioner was guilty of

the charge if he merely brushed the prosecutrix. More was required for conviction than proof of contact. In failing to define "offensive touching" the District Court unconstitutionally diminished the Prosecution's quantum of proof necessary to prove the offense, beyond a reasonable doubt. The prejudice suffered by Petitioner was further compounded by the failure to provide a "de minimus" instruction concerning the level of force. (R.T. Page 565).

QUESTION THREE

QUESTION 3: Did the Trial Court err in refusing Petitioner's request for a "De Minimus" instruction as to the Level of Force Constituting the Alleged Battery? [Due Process].

The Petitioner submitted a specific instruction which would have cautioned the jury that not every contact was an "offensive touching" which would excite the criminal law and constitute a battery. The District Court refused Respondent's specific instruction and failed to charge the jury on this point. This refusal allowed the jury to convict the Petitioner if any touching had occurred at all, a result clearly at odds with any precedent of this Court or the other circuits.

The District Court reasoned that "This is not a 'de minimus situation—Your defense is that it did not happen'.". (R.T. Page 565). The Court thus limited Petitioner's defense to one theory of the case. There is no precedent for such a holding and the prejudice suffered by Petitioner is clear. Not every touching can be a battery in our crowded society. Certainly, a "de minimus" touching could have occurred and, if it did, the Petitioner would not be guilty. The District Court, through its in-

structions, forced Petitioner to choose between the alternative defenses of "de minimus" contact or no contact at all.

It had no power to do so. Its successful effort to prejudice the jury by charging them accordingly mandates reversal. For not only may a Defendant place two alternative defenses before the jury, even though inconsistent, but a jury may acquit a Defendant on the simple basis that it disbelieves the prosecution's version of the case —and for no other reason.

The Government successfully argued below "Sommerstedt was not entitled to the instruction, because he did not introduce any evidence to support his theory that only a slight brushing occurred." (See Appellee's Brief, page 17A). Petitioner's clear position (along with other defense witnesses) was that any collision, if it occurred, was so slight that it would not be noticeable and, certainly would not constitute a battery or offensive touching. (R.T. Pages 491 and 495). Lack of awareness of a minor touching, in a crowded hallway, cannot be convoluted to negate a crucial defense to the crime of assault. The Government's rationale hinges on the discredited proposition that the jury must slavishly accept either the version of the Prosecution or that of the Defense. Such is definitely not the case in any Federal Circuit subject to this Court's review. Petitioner was entitled to argue two consistent theories of defense—(1) that the collision never occurred or (2) that any inadvertent contact was so slight as to be unnoticeable and thus, of insufficient quantum of force to satisfy the test of battery or assault.

Denial of this defensive instruction violated Petitioner's right to due process of law and mandates reversal.

QUESTION 4

QUESTION 4: Can the Trial Court refuse to instruct the jury on a lesser-included offense? [Due Process].

Even the District Court agonized somewhat over the prosecution's effort to match Sommerstedt's alleged conduct with the felony described in Section 111. The prosecution indicated to the District Court that it could make out no other charge against the Defendant. The defense initally asked for a description of the lesser included offense at the intial charging of the jury right after it was sworn. (R.T. Pages 42 and 43.) The District Court refused.

Later, in a brief exchange between the District Court and counsel, the Petitioner clearly stated his grounds for demanding the charge on a lesser included offense. (R.T. Pages 556 and 557). After brief consideration the District Court refused the proffered defense instruction and also refused to make any instruction of its own, citing lack of Federal jurisdiction over the scene of the crime. (R.T. Pages 558 and 559). The prosecution's argument, accepted by the Court, placed the burden on the defense to prove federal jurisdiction. The District Court noted that had a misdemeanor offense been available, it would have fully charged the jury concerning it. (R.T. Page 557).

Both Marshals Crotty and Miller acknowledged they were "on duty" on the day of the offense. They "provided security" for the Court of Appeals while it was in session and immediately thereafter. They were present under specific assignment by their superiors. (R.T. Pages 312, 313 and 326).

The record, taken as a whole, establishes occupation of the premises by the United States Court of Appeals, with the Marshals responsible for maintaining security. They were delegated to do so under the authority of Section 318(b) of Title 40 U.S.C.

Section 318(b) must be read in conformity with Title 40 U.S.C. Section 318(c) which states:

> "Whoever shall violate any rule or regulation promulgated pursuant to Section 318(a) of this Title shall be fined not more than $50 or imprisoned not more than 30 days, or both."

G.S.A. Regulations empowered Miller and Crotty to maintain order and building security. As stated in Section 318(a):

> "The Adminstrator of General Services or officials of the General Services Administration duly authorized by him are authorized to make all needful rules and regulations for the Government of Federal property under their charge and control, and to annex to such rules and regulations such reasonable penalties, within the limits prescribed in Section 318(c) of this Title, as will insure their enforcement, provided, that such regulations shall be posted and kept posted in a conspicuous place on such federal property."

At the outset, it must be noted that the uniform rule in Federal Circuits demands that a Defendant be given a "lesser included offense" instruction whenever the facts, evidence, and charge warrant it. In discussing a Defendant's entitlement to such a charge a Panel of the Ninth Circuit Court of Appeals observed:

> "Thus, in a case where some of the elements of the crime charged themselves constitute a lesser crime, the Defendant, if the evidence justifies it, is entitled to an instruction which would permit a finding of guilt of a lesser offense." Citing *Berra v. U.S.*, 76 S. Ct. 685, 100 L.Ed. 1013 (1956). *Stevenson v. U.S.*, 16 S. Ct. 839, 40 L.Ed. 980 (1896). See *U.S. v. Crutchfield*, 547 F.2d 496 (C.A. 9, 1977).

The Panel also noted:

> "The evidence might appear to the Court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter . . . and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be a matter of law for the decision of the Court.
>
> We conclude that the District Court erred in refusing to give the lesser-included offense instruction." *Crutchfield* at Page 501 citing *Stevenson v. U.S.* 16 S. Ct. at 839.

The next question which should be resolved, in light of the above principles, is—What are the lesser included offenses under Section 111? The answer to this question is simple. Any conduct of Reinhold Sommerstedt, which constituted a violation of law or regulation could constitute a lesser-included offense under Section 111. The lesser included offenses under Section 111 could be any misdemeanor from simple assault on down to creating a public nuisance.

In a very similar case, *U.S. v. Rankin*, 616 F.2d 1168 (C.A. 10, 1980) a Federal Court of Appeals wrestled with an appeal from a misdemeanor conviction for violation of building regulations. As the Court observed in describing the case:

> "Hal Rankin and Bryan Hunt were charged with violations of 40 U.S.C. Section 318 and 41 C.F.R. Section 101-20.304 (1978). The regulation provides, in part, that conduct which impedes or disrupts a performance of official duties by Government employees is prohibited. Trial of these misdemeanor charges was before the Honorable Robert S. Risley, U.S. Magistrate sitting in Tulsa, Oklahoma. Both Defendants were found guilty of conduct in violation of 41 C.F.R. Section 101-20.304 (1978). Each was fined $50.00 and sentenced to ten (10) days in jail, with the jail sentences in both instances being suspended.
>
> Rankin started to ask Chairman Wolfe for a postponement of the In Camera Hearing until he could get a Court Order to enjoin the holding of such Hearing, but he was 'waived down'. It was in this setting that Rankin and Hunt, acting upon a prearranged plan proceeded to chain themselves to the brace of one of the swinging doors of the Courtroom. The In Camera proceedings were delayed some 10 to 15 minutes until a Deputy Marshall cut the chains and removed the Defendants from the Courtroom." See *Rankin* at Page 1169.

The above disruptive acts were held to have impeded Government officials in the performance of their duties. The Court of Appeals referred to such conduct as "disorderly" and found that the misdemeanor case, for violation of Government building regulations, designed to control security of buildings occupied by the United States, was well made out.

Rankin clearly establishes that a violation of building regulations, such as engaging in disorderly conduct, is a misdemeanor offense which constitutes a lesser-included violation within Section 111. Obviously, Sommerstedt

could have been charged with mere disorderly conduct, or disruption. There still remains, however, the jurisdictional question raised by the Prosecution. That issue has been disposed of by the United States Court of Appeals for the Fifth Circuit which declined to reverse the conviction of a Defendant, on the same grounds.

In *U.S. v. Gliatta,* 580 F.2d 156 (C.A. 5, 1978) a Panel of the United States Court of Appeals for the Fifth Circuit, including Chief Justice John R. Brown, deftly disposed of a Defendant's jurisdictional arguments and, in upholding his conviction for violation of postal regulations on property where jurisdiction *had not been ceded by the State to the Federal Government* observed:

> "The crucial step in the Appellant's argument is the initial one. At first blush, the Appellant's proposition appears correct . . .
>
> The Government concedes that it did not as of January 4, 1978, have exclusive or concurrent jurisdiction over the postal facility in which Appellant's conduct occurred. The Appellant therefore argues, relying on *Adams,* that we must reverse his convictions and dismiss the charges for lack of jurisdiction. And so we would, but . . .
>
> Unfortunately the Appellant overlooks the Treasury, Postal Service, and General Government Appropriations Act of 1978, Public Law No. 95-81, which was enacted some six months before the conduct in question.". See *Gliatta* at Pages 158 and 159.

The Panel of the Fifth Circuit examined the purposes for the "Penal Regulations" and held that Congress, by enacting Section 610, had provided a mechanism by which the United States . . . or its instrumentalities, such as the United States Postal Service and the Government

Services Administration could maintain order on postal and other Government facilities, and thereby facilitate Governmental activities. (See *Gliatta* at Page 159).

The Court in *Gliatta* made it clear that without this jurisdictional enactment by Congress the misdemeanor convictions for violations on the Postal regulations would have been reversed. In the instant case, the regulations promulgated by the General Services Administration (G.S.A.) provide the same penal misdemeanor sanctions as those enacted by the Postal Service. This Court may take judicial notice of the Court of Appeals' delegation of matters concerning Courtroom security to the General Services Administration. That Administration has, itself, enacted its own regulations. See Section 101-20.305 of the Code of Federal Regulations.

Sommerstedt's violation of the above regulations constituted a misdemeanor punishable under 40 U.S.C. Section 318(c). Thus, the jurisdictional arguments advanced by the Prosecution, and adopted by the District Court, were clearly wrong. Title 40 U.S.C. Section 255 had no application. Cession of jurisdiction by the State was not necessary for prosecution on the lesser-included offense. Since Sommerstedt's conduct could well have been found to have "impeded or disrupted the performance of official duties by Government employees" or to have constituted a "conduct on property which created loud or unusual noise or a nuisance" it is clear that the jury could have convicted, under the facts and state of the evidence, on the lesser-included offense without having convicted on the felony. The jury's announcement of a hopeless deadlock on two occasions prior to returning the verdict in question, is but further evidence of the severe damage Petitioner suffered through the District

Court's refusal of the instruction. (R.T. Pages 657 and 660).

The Government successfully condemned Petitioner for failing to provide the District Court with an instruction on a lesser included offense which accurately tracked the language contained in 41 C.F.R. Section 101-20.305. Yet, Government counsel represented to the District Court at the Charging Conference, that no lesser included offense existed under Title 18 U.S.C. Section 111. (R.T. Page 557). Thus, the Government, through its misrepresentations, invited the District Court into error.

Petitioner should not be punished for the inability of his counsel to discover a relatively obtuse point of law entitling Petitioner to the charge under the obscure Regulations. This is especially true where Government counsel and the District Court itself, were likewise ignorant of the regulatory provisions.

Considering a similar dilemma, the United States Court of Appeals for the Eighth Circuit had this to say about the rationale for the application of the "plain error" rule to the area of jury instructions in a federal criminal trial. The Court of Appeals observed:

> "Moreover, strategic choices as to the conduct of a trial, deliberately made and employed by counsel, can not, if they go awry, serve as the basis for a later appeal. However, in the case before us, there was recent and unequivocal authority in this Circuit denying precisely the instruction sought . . .
>
> "Nor is the Doctrine of Waiver more helpful to the Government. It is clear that the Appellant did not intentionally and knowingly relinquish any then existing right he had to the instruction here involved.

> Under these circumstances, the failure of Appellant to request the instruction or to object to its refusal does not foreclose his raising the issue on this appeal or justify a rejection of his arguments on such grounds.". *United States v. Grant*, 489 F.2d 27 (C.A. 8, 1973) at P. 30.

There was no "strategic choice" to keep the District Court in the dark concerning the lesser included offense. Petitioner's counsel explained the basis for the lesser included offense instruction to the District Court on numerous occasions. (See Appellant's Opening Brief below, P. 38.) The District Court was thus fully appraised of the facts supporting the submission of the requested instruction on the lesser included offense. *United States v. Garnes*, 258 F.2d 530 (C.A. 2, 1958).

Government counsel can cite no authority supporting the argument that submission of a perhaps erroneously worded lesser-included offense instruction is tantamount to no request at all for the purpose of determining whether an instruction was submitted or objection made under Rule 30 of the Federal Rules of Criminal Procedure.

Yet, the lesser included offense instruction submitted by Petitioner's counsel, though specifying simple assault, was substantially correct when read in light of the regulations governing conduct on "federal property" described in Appellant's Opening Brief. It is Petitioner's position that the lesser included offense he submitted is "substantially equivalent" to the proper instruction and, therefore, would be sufficient to mandate reversal of this conviction even if the "plain error" rule applied.

The Government states that failure to submit a precisely worded instruction defeats Petitioner's point of

error. Yet, the reviewing Court of Appeals, in applying the "plain error" rule, and analyzing its purpose, was not nearly so harsh, observing, instead, that,

> "The general rule is that a claim of error in a jury instruction is waived, unless the Defendant excepts to the instruction before the jury retires to consider its verdict. *The purposes of the rule are to enable the District Court to correct a defect, if any, in the instruction, and to prevent a Defendant from hedging the risk of an adverse verdict by inviting error.*" *United States v. Scott,* 425 F.2d 555 (C.A. 9, 1970) at P. 57. Citing 8 A. J. Moore, Federal Practice, Section 51.02 (2d Ed. 1968).

There was no effort on counsel's part to mislead the District Court, nor was error invited. If an honest error was in fact made by the District Court and both counsel for the respective parties below, can the innocent Defendant be made to suffer the consequences of such an error? The answer is clearly "no"! Defendant made no conscious choice to "create error." Thus, the "plain error" rule does not apply. Here, as in *Scott,* there was no calculated and intentional waiver of a known right which operates against the interest of the guilty party on appeal.

United States v. Price, 444 F.2d 248 (C.A. 9, 1971) cited by the Government, is inapposite. In that case, no lesser included offense instruction was submitted by defense counsel nor was any objection given to the failure by the District Court to charge on the offense. *Price* at P. 250.

Yet, even under the "plain error" rule the lesser included offense instruction should have been given and the failure to give it mandates reversal. As stated in *Devitt and Blackmar,* Section 18.05, P. 584:

> "If the 'lesser included' hypothesis is clear from the evidence the Court should give it without request, but if the theory is not so clear then the Defendant may waive his right to complain by failure to request.". Citing *United States v. Lumpkins,* 439 F.2d 494 (C.A.D.C., 1971).

Failure to review the record of this case, in order to determine whether or not the giving of a lesser included offense was supported would be a "manifest error". Review is necessary "to prevent a miscarriage of justice." *Kitchens v. United States,* 272 F.2d 757 (C.A. 10, 1959).

Recognizing, perhaps, the futility of its arguments in support of its "waiver" theory, the Government next argued that the evidence below would not support the submission of the lesser included offense framed in conformity with the regulations.

First, Government counsel argued that Petitioner failed to prove that the Pasadena City Hall was within the territorial jurisdiction of the United States. Under this rationale, it successfully suggested below that neither the regulations cited, nor Title 18 U.S.C. Section 1139(e) apply.

The Government next claimed, that there is no proof that the Marshals had been assigned to the courtroom security by the General Services Administration. Lastly, the Government insisted that the record below does not support a finding that the regulations were "posted" as provided for, by law, in order to make them effective on federal property.

Each of these arguments is insubstantial and easily disspelled after a thin modicum of examination. As noted below in Appellant's Opening Brief, both Marshals in-

dicated they were "on duty" on the day of the offense "providing security" for the Court of Appeals while it was in session and immediately thereafter. (See P. 39 of Appellant's Opening Brief.) The Government urges upon this Court myopic blinders which it need not wear. It is an undisputed fact that the General Services Administration has been delegated the duty of providing security in all courtrooms of the United States. Given the testimony of Marshals Miller and Crotty *and* the specific wording of Title 40 U.S.C. Section 318(b) it is patently clear that the Marshals were assigned to provide courtroom security under the auspices of the General Services Administration which had jurisdiction over the "property occupied by the United States." If there is any evidentiary insufficiency, then Rule 201 of the Federal Rules of Evidence is a certain and immediate cure. As stated by the Second Circuit:

> "It is clear that under Rule 201 of the Federal Rules of Evidence judicial notice may be taken during an appeal. While it is somewhat unusual to take judicial notice of proceedings not directly involving the parties to an action, we believe that notice can properly be taken here where the facts being noticed are not in dispute, . . .". *Ives Laboratories, Inc. v. Darby Drug Co.*, 438 F.2d 538 (C.A. 2, 1981).

For further authority, see *Government of Canal Zone v. Burjan*, 596 F.2d 690 (C.A. 5, 1979) at P. 694.

> "Where adequate information is available for taking of judicial notice, an Appellate Court should use such informtaion.". *United States v. Gonzales*, 442 F.2d 698 (C.A. 2, 1970).

Likewise, this Court should judicially notice the fact that a United States Court of Appeals, by definition, while sitting in session, is located on "property occupied by the United States."

Government counsel's reading of *United States v. Gliatta,* 580 F.2d 156 (C.A. 5, 1980) is astonishing. In fact, *Gliatta* involved a statute empowering both the Postal Service *and* the General Services Administration to promulgate regulations concerning the "orderly occupation and use" of federal propetry. It is evident that Government counsel did not read the statutory references contained in *Gliatta;* otherwise, he would not have represented to the Court of Appeals that "Sommerstedt . . . failed to identify any such statute involving judicial facilities.". (See Section 610, 91 Stat. 356, P.L. 95-81).

Since the jurisdiction of the General Services Administration attaches to any courtroom and/or its environs "occupied" by the Court of Appeals these regulations were clearly in effect at the time of the alleged incident constituting the offense. The marshals on duty that day had the same powers as "special policemen" but were not restricted to "certain federal property" as otherwise required by the proviso contained in said section. (40 U.S.C. Section 318).

The Government's last effort to defeat Petitioner's entitlement to the instruction is its argument that "there was no evidence of a disruption of official duties necessary for a conviction under the regulations." (See Appellee's Brief below, P. 19, Note 13.) This self-contradictory argument flies in the face of the Government's previous claim, (See Appellee's Brief below, P. 15) that "a jury could have also reasonably concluded that Sommerstedt impeded and

interfered with Ms. Byrd when he ran into her while she was engaged in conversation with federal agents." Like Alice in her Wonderland, the Government must make a choice. When asked for clarification, it can not "disappear, by degrees until nothing is left but the smile." The Government's evidentiary arguments concerning Sommerstedt's "loud and forceful manner" (See Appellee's Brief below, P. 5) are more than adequate support for a finding of "nuisance" under the regulations. It is also submitted that these regulations encompass a simple but minor assault or battery as defined at common law. It can not be said that the jury would not have found Sommerstedt guilty of simple battery, assault, or creating a nuisance as defined by said regulations. (In fact, a minor battery or assault is almost certain to be a "nuisance" when it occurs.)

United States v. Cassiagnol, 420 F.2d 868 (C.A. 4, 1970) provides an exhaustive review of the regulations in question as well as legislative and/or administrative history. From this decision, and others, the evidentiary support for the lesser included offense charge, in the case below, is manifestly apparent. In fact, the conduct of the Defendants in *Cassiagnol* was much more grievous than that attributed to the Defendant here—breaking through a line of marshals in order to avoid arrest.

Petitioner called the "specific fact situation that would require giving of the lesser included offense instructions" to the Trial Court's attention. See *United States v. Lincoln,* 630 F.2d 1313 (C.A. 8, 1980) at P. 1321. No more was required. See *United States v. Lumpkins,* 439 F.2d 494 (C.A.D.C. 1970) at Page 496. If Sommerstedt's felony conviction is allowed to stand, it will constitute the lowest quantum of force and aggravating circum-

stances ever upheld as a felony assault under Section 111. As indicated by the District Court, in the discussion it had with both counsel, the facts of this case more nearly fit the misdemeanor charge than the felony. The advice of the Panel of the Court of Appeals in *Crutchfield* should be taken to heart. The cause should be remanded to the District Court with the instruction to either enter a verdict of guilty on the lesser included offense or to grant Petitioner a new trial where the jury will be properly charged as to the lesser-included violation.

REASONS FOR ALLOWANCE OF THE WRIT

The Prosecution failed to prove all four elements (intimidating, impeding, interfering, and assaulting under Title 18 U.S.C. Section 111) charged under the Indictment (due process).

The District Court erred in failing to define "offensive touching" in its Instructions to the Jury (due process).

The District Court erred in refusing Petitioner's request for a "de minimus" instruction as to the Level of Force Constituting the Alleged Battery (due process).

The District Court erred in failing to instruct the jury on a lesser included offense as requested by the Petitioner (due process).

CONCLUSION

For all the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOE ALFRED IZEN, JR.
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8191 Southwest Frwy., #117
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(713) 776-0850

Attorney for Petitioner
Reinhold V. Sommerstedt

CERTIFICATE OF SERVICE

I, Joe Alfred Izen, Jr., certify that three true and correct copies of the foregoing were sent to Richard Drooyan, Assistant United States Attorney, 312 North Spring Street, Los Angeles, California 90012 and the Solicitor General of the United States, Rex E. Lee, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530 on this the 12th day of August, 1985 by United States mail, postage prepaid.

JOE ALFRED IZEN, JR.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5116

D.C. No. CR 83-1039-Kn

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REINHOLD SOMMERSTEDT,
Defendant-Appellant.

On Appeal from the United States District Court
Central District of California
Hon. David V. Kenyon, Judge Presiding
Argued and Submitted: December 3, 1984

(Filed February 7, 1985)

OPINION

Before: PREGERSON and BOOCHEVER, Circuit Judges, and ORRICK,* District Judge.

PREGERSON, Circuit Judge:

Reinhold Sommerstedt appeals his conviction for assaulting Christine Byrd, an Assistant United States Attorney, in violation of 18 U.S.C. § 111 (1982). We have jurisdiction to hear this appeal under 28 U.S.C. § 1291 (1982). We affirm.

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* The Hon. William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

FACTS

On December 5, 1983, Sommerstedt was a spectator at the oral argument in *United States v. Condo,* 741 F.2d 238 (9th Cir. 1984) (per curiam). The defendant-appellant in that case, Armen Condo, appearing in pro. per., operated a group called "Your Heritage Protection Association." Sommerstedt was a member of the group. Arguing against Condo's position on appeal was Assistant United States Attorney Chirstine Byrd.

The argument was held in the City Council Chambers of the Pasadena City Hall. Just before the conclusion of Condo's rebuttal, a member of the court told Condo that he was "fighting a lonely battle." In response to this remark, Sommerstedt stood up silently for the last one or two minutes of the argument.

After oral argument, Sommerstedt approached Alan Lipkin, a special agent for the Internal Revenue Service (IRS), who was moving toward the courtroom exit. Lipkin had supervised the investigation against Condo. Sommerstedt asked Lipkin in a loud, threatening manner whether he headed the IRS group investigating tax protesters. After Lipkin responded affirmatively, Sommerstedt demanded that Lipkin return records seized from Sommerstedt's employer, Scientific Asset Management, pursuant to a search warrant. Lipkin told Sommerstedt that he was the subject of a grand jury investigation and should direct his questions to a United States attorney.

Five minutes later, Assistant United States Attorney Christine Byrd was in the hallway outside the courtroom conversing with several United States deputy marshals and IRS agents about the proceedings. By now, Sommerstedt was standing at the opposite end of the hallway

in a large group of people that included Condo. Sommerstedt then broke off from the group and walked toward the end of the hallway where Byrd was standing. Sommerstedt alleged that he turned sideways to make his way through the group in which Byrd was standing. Another defense witness testified that if Sommerstedt made contact with Byrd at all, he merely brushed against her. Prosecution witnesses, however, testified that Sommerstedt walked briskly up to Byrd, jolted her left arm and shoulder with his left side, and then hurried away without saying a word. Byrd suffered no physical injury but testified that she was shocked and upset by the collision.

STANDARD OF REVIEW

Sommerstedt contends that the evidence was insufficient to support the jury's verdict. In reviewing a jury's verdict we must view the evidence in the light most favorable to the government and must draw all reasonable inferences supporting the conviction. *United States v. Francisco*, 536 F.2d 1293 (9th Cir.), *cert. denied*, 429 U.S. 942 (1976); *United States v. Beecroft*, 608 F.2d 753, 756 (9th Cir. 1979). There was ample evidence for the jury to conclude that Sommerstedt deliberately jolted Byrd's left arm and shoulder with his left side.

PROPOSED JURY INSTRUCTION

Defense counsel attempted to prove at trial that if Sommerstedt made contact with Byrd at all, he merely brushed against her. Therefore, defense counsel requested that the district court give a jury instruction entitled "Offensive Touching—Required Degree of Aggravation." The instruction stated in part:

> Section 111 is not meant to sweep in all harassment of Government officials involving "laying a finger" on them. . . . Under the statute, there are circumstances and environmental factors which make the slightest amount of physical contact between the Defendant and the Government official illegal. In the present case, however, no such aggravating circumstances or "environmental factors" or present.

Sommerstedt contends that the district court erred in refusing to give this instruction.

A trial court must instruct the jury on a defendant's theory of the case only if the evidence sufficiently supports the theory and the theory is supported by law. *United States v. Davis,* 597 F.2d 1237, 1239 (9th Cir. 1979). Sommerstedt's theory is not supported by law.

The defensive theory, indicated in the proposed instruction, is that Sommerstedt could not be convicted under section 111 unless he used more than a minimal level of force against Assistant United States Attorney Christine Byrd. He bases his theory on Congress's use of the word "forcibly" in section 111, which provides in part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined no more than $5,000 or imprisoned not more than three years, or both.[1]

We reject Sommerstedt's theory because we find that "forcibly" means only that some amount of force must be used. *See United States v. Abraham,* 627 F.2d 205

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1. Assistant United States attorneys are designated in 18 U.S.C. § 1114 (1982).

(9th Cir. 1980) (per curiam). Appellants in *Abraham* had been convicted under 18 U.S.C. § 111 for assaulting an FBI agent while he was serving process. They argued that the jury should have been instructed on 18 U.S.C. § 1501, which made it a misdemeanor to assault an authorized person serving process, because less force was required to make out a violation of section 1501 than of section 111. We stated that we found "nothing in the language of the two statutes, the legislative history, or the cited authorities to suggest such a distinction" between the two statutes. *Id.* at 207.

Because section 1501 outlaws "assaults," *Abraham* stands for the proposition that no more force is required to make out a violation of section 111 than is required for an assault under section 1501. An assault "is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *United States v. Dupree,* 544 F.2d 1050, 1051 (9th Cir. 1976) (per curiam). This definition does not require that any particular level of force be used. Therefore, we hold that a defendant may be convicted of violating section 111 if he or she uses any force whatsoever against a federal officer designated in 18 U.S.C. § 1114. *See United States v. Frizzi,* 491 F.2d 1231, 1232 (1st Cir. 1974) (spitting in the face of a mail carrier is a forcible assault under section 111 because this statute requires only "an application of force to the body of the victim" not "the infliction of bodily injury." *See also discussion in United States v. Corbitt,* 675 F.2d 626, 629 (4th Cir. 1982) (defendant convicted under 18 U.S.C. § 111 for twice pushing away a narcotics agent

who sought to detain defendant's shoulder bag until agent could procure a search warrant); *United States v. Mathis*, 579 F.2d 415, 418 (7th Cir. 1978) ("A verdict of guilty of assault or interference with a federal official without a weapon under 18 U.S.C. § 111 requires evidence that the defendant used some quantum of force or threat of force in committing the offense"); *United States v. Alsondo*, 486 F.2d 1339, 1345 (2d Cir. 1973) (lifting a hand menancingly, as though to shove a federal narcotics agent, and shoving the agent, are "both acts sufficient to constitute a crime under section 111"), *rev'd on other grounds sub nom. United States v. Feola*, 420 U.S. 671 (1975).

Sommerstedt's reliance on *United States v. Bamberger*, 452 F.2d 696 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972), is misplaced. The appellants in *Bamberger* were convicted under section 111 for their participation in an incident in a maximum security prison. The contended, as does Sommerstedt, that the district court erroneously defined "forcibly" in its jury instructions. But their claim of error was entirely different from Sommerstedt's. The appellants in *Bamberger* conceded that certain "situations in which there is incidental touching or no touching at all can give rise to violations" of section 111. *Id.* at 699. Their contention on appeal was that the district court erred because its instruction emphasized the quantum of touching but failed to explain that the defendants must have used or attempted to use force "as a method of persuasion of a federal official." *Id.* Although the court noted that the charge may have unwisely emphasized the importance of mere touching,[2] "taken as a whole it was not

2. The jury instruction stated in part: "If there is force, no matter how slight . . . that would be sufficient" for a conviction under section 111. *Bamberger*, 452 F.2d at 698.

misleading" and "adequately defined the elements of the crime." *Id.* at 700.

Public Policy

The goal of Congress in enacting 18 U.S.C. § 111 in 1934 was to give "maximum protection to federal officers. . . ." *United States v. Feola*, 420 U.S. 671, 684 (1975). Fulfillment of this goal required "the highest possible degree of certainty that those who killed or assaulted federal officers were brought to justice." *Id.* Sommerstedt asks us to hold that section 111 is not implicated by the use of a small amount of force against a federal officer. Such a ruling would create uncertainty as to the degree of severity of assaults on federal officers punishable under section 111. Such uncertainty would frustrate Congress's goal in enacting this statute.

The present case illustrates why federal officers, in performing their duties, should have maximum protection from the wrongful use of any force directed against them. An assistant United States attorney is responsible for prosecuting persons accused of federal offenses. While she was not physically injured by Sommerstedt's wrongful assault, if this incident goes unpunished, government counsel might conceivably be deterred from vigorously prosecuting criminal defendants to the best of her abilities.

COERCION OF THE VERDICT

Sommerstedt argues that the district court coerced a verdict by sending the jury back for deliberations after the foreperson indicated that the jury could not reach a unanimous verdict.

We review for abuse of discretion a district court's decision whether to declare a mistrial when a jury indicates

that it is deadlocked. *United States v. See,* 505 F.2d 845, 850 (1974) (citing *Illinois v. Sommerville,* 410 U.S. 458, 462 (1973); *Gori v. United States,* 367 U.S. 364, 368 (1961)), *cert. denied sub nom. Gordon v. United States,* 420 U.S. 992 (1975).

In deciding whether to declare a mistrial, the district court should take all relevant circumstances into account rather than apply an abstract formula. *United States v. See,* 505 F.2d at 851. A jury's statement that it currently is deadlocked is, by itself, an insufficient ground for declaring a mistrial. *Id; see also United States v. Ross,* 626 F.2d 77, 81 (9th Cir. 1980) (trial judge did not abuse discretion by not declaring mistrial after jury failed to reach verdict on all counts after a full day of deliberations).

Here, jury deliberations began on Friday, March 30, at 9:00 a.m. At 2:12 p.m. that afternoon the foreperson sent a note to the judge stating: "The jury is unable to reach a unanimous verdict." The judge put the jurors in the box and instructed them on the importance of reaching a verdict. He then asked the foreperson whether the jury could reach a verdict if it deliberated a little longer. The foreperson replied: "I don't think that would serve any useful purpose, your Honor. I don't think we would be able to reach a unanimous verdict." The judge, nevertheless, sent the jury back for further deliberations at 3:36 p.m.

At 5:05 the judge received another notice from the jury stating that it was unable to reach a unanimous verdict. The judge again instructed the jury on the importance to the parties of having a verdict and asked the jury to resume deliberations on Monday, April 2, at 9:00 a.m.

At 10:30 a.m. on April 2, the jury reached a unanimous verdict of guilty.

The record does not indicate that the jury was exhausted. Moreover, the jury had three full days of testimony to evaluate. Accordingly, we are unable to conclude that Judge Kenyon abused his broad discretion by asking the jury to deliberate for more than one day.

LESSER INCLUDED OFFENSE

Sommerstedt argues that the district court erred by not instructing the jury that it could find him guilty of violating 40 U.S.C. § 318b (1982), a lesser offense included within 18 U.S.C. § 111. Sommerstedt did not request such an instruction below. Therefore, he is entitled to a new trial only if the district court's failure to instruct the jury on section 318b was plain error. *See* Fed. R. Crim. P. 30, 52(b).

We find that the district court's failure to give an instruction on section 318b was neither plain error nor error at all. An offense under section 318b may take place only on property under the "administration and control" of the United States and "over which the United States has acquired exclusive of concurrent jurisdiction." 40 U.S.C. § 318b. Sommerstedt introduced no evidence that the Pasadena City Hall, where he jolted Byrd, meets either of these conditions.

ELICITING OF PREJUDICIAL EVIDENCE

Sommerstedt argues that the district court erred in denying his motion for mistrial because the prosecution elicited prejudicial evidence on cross-examination of a defense witness. The prosecution asked witness Wesley

Stepp: "The first time then that you knew anything about the Condo case came from Mr. Sommerstedt?" Stepp answered: "I read something in the paper about him being convicted of mail fraud."

We review a district court's denial of a motion for mistrial for abuse of discretion, *United States v. Hodges*, 566 F.2d 674, 676 (9th Cir. 1977) (per curiam), and find that the district court correctly denied the motion for two reasons.

First, the government's questioning of Wesley Stepp was not improper. The government did not ask Stepp about the nature of Condo's case. Rather, Stepp's answer was unresponsive to the question. Second, the district court cautioned the jury immediately after Mr. Stepp's answer, thereby curing any potential harm from his answer. *See United States v. Buras*, 633 F.2d 1356, 1360-61 (9th Cir. 1980) (district court correct in not declaring mistrial following improper questioning of defendant where court sustained defendant's objection and gave curative instructions immediately thereafter and again at close of trial); *Hodges*, 566 F.2d at 676 (district court did not abuse its discretion in denying motion for mistrial where prosecution made reference in cross-examination to defendant's kidnapping conviction but court immediately instructed jury to disregard the matter and it did not appear that jury was improperly influenced).

IMPEACHMENT OF WITNESSES

Sommerstedt contends that the district court erred in allowing the government to impeach defense witnesses by eliciting testimony about their beliefs. Specifically, Sommerstedt contends that the government improperly

elicited testimony that he and other defense witnesses were associated with Condo, a convicted felon, and that they shared Condo's anti-tax beliefs. As for Sommerstedt, the testimony was clearly relevant to show his alleged motive and intent to intimidate or interfere with an Assistant United States Attorney's performance of her duties.

As for testimony that other defense witnesses were associated with Condo, any doubt that may have existed about the admissibility of this testimony was dispelled by the Supreme Court's decision in *United States v. Abel*, ____U.S.____, 105 S. Ct. 465 (1984), *rev'g* 707 F.2d 1013 (9th Cir. 1983). Respondent in *Abel* argued that his bank robbery conviction should have been overturned because the district court allowed the prosecution to elicit testimony that respondent and his key witness, Robert Mills, belonged to a "'secret type of prison organization' which had a creed requiring members to deny its existence and lie for each other." *Id.* at 467. The Court held that this testimony was admissible because it showed Mill's possible bias toward respondent.[3] *Id.*

Two of the Court's findings are most relevant here. First, the Court found that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy

3. The Court defined bias as "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor or against a party." *Abel*, 105 S. Ct. at 469.

and truth of a witness' testimony." *Id.* at 469.[4] Second, the Court found that membership of a party and a witness in the same organization, even without proof that either one has adopted the tenets of the organization, is probative of bias. *Id.* If testimony of membership alone is probative of bias, then testimony that Sommerstedt and other defense witnesses were associated with Condo and shared his anti-tax beliefs was clearly admissible to prove the bias of these witnesses.

OTHER CONTENTIONS MERITLESS

Finally, Sommerstedt contends that the district court should have dismissed the indictment and that the district court was biased in favor of the government at trial. Our review of the record satisfies us that these contentions are meritless.

AFFIRMED.

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4. In *Abel*, the Court also observed that "[i]f the organization is a loosely knit group having nothing to do with the subject matter of the litigation, the inference of bias arising from common membership may be small or non-existent." 105 S. Ct. at 470. In the instant case, the organization may well have been loosely knit, but its purpose was closely related to the subject matter of the litigation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5116

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REINHOLD SOMMERSTEDT,
Defendant-Appellant.

(Filed June 13, 1985)

ORDER

Before: PREGERSON and BOOCHEVER, Circuit Judges, and ORRICK,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judges Pregerson and Boochever voted to reject the suggestion for rehearing en banc and Judge Orrick recommended such rejection.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable William H. Orrick, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DOCKET NO. CR 83-1039 Kn

UNITED STATES OF AMERICA

v.

REINHOLD SOMMERSTEDT

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, April 23, 1984, with counsel, Joe Alfred Izen, Jr./Daniel A. Vercker-Retained, pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense of 18 U.S.C. 111: Assault of a Federal Officer.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years, and defendant is fined $500, on condition that the defendant is confined in a jail-type institution for a period of 30 days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on probation for

a period of two (2) years to commence upon release from confinement. The conditions of probations are: (1) that defendant comply with rules and regulations of the Probation Office and General Order 225. (2) That the $500 fine be paid through the Probation Office in such amounts as directed by the Probation Officer.

IT IS ORDERED that if a Notice of Appeal is not filed the defendant shall surrender to U.S. Marshal by 12 Noon on 4-30-84. Bond shall remain as bond on appeal if an appeal is filed.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

/s/ DAVID V. KENYON
David V. Kenyon
U.S. District Judge

Date: April 24, 1984.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-5116

DC# CR 83-1039-RJK
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REINHOLD SOMMERSTEDT,
Defendant-Appellant

(Filed August 5, 1985)

ORDER

Before: PREGERSON, Circuit Judge

Appellant's motion for a stay of mandate pending the timely filing of a petition for a writ of certiorari is GRANTED TO and including August 12, 1985. Fed. R. App. P. 41(b).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-5116

DC# CR 83-1039-RJK
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REINHOLD SOMMERSTEDT,
Defendant-Appellant

(Filed June 28, 1985)

ORDER

Before: PREGERSON, Circuit Judge

Appellant's motion for a 30-day stay of Mandate pending application for a writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5116

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REINHOLD SOMMERSTEDT,
Defendant-Appellant.

(Filed May 15, 1985)

ORDER

Before: PREGERSON and BOOCHEVER, Circuit Judges, and ORRICK,* District Judge.

The court's opinion in this case filed February 7, 1985, is amended as follows:

The third sentence in the first paragraph under "Facts" which reads "Sommerstedt was a member of the group," is stricken.

The second paragraph under "Facts" is amended to read:

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* The Hon. William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

The argument was held in the City Council Chambers of the Pasadena City Hall. Just before the conclusion of Condo's rebuttal, a member of the court told Condo that he was "fighting a lonely battle." In response to this remark, Sommerstedt, a supporter of Condo, stood up silently for the last one or two minutes of the argument.